No. 03-1388

IN THE
Supreme Court of the United States

DOUGLAS SPECTOR, *ET AL.*,
Petitioners,

v.

NORWEGIAN CRUISE LINE LTD.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT

DAVID C. FREDERICK
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

THOMAS H. WILSON
Counsel of Record
MICHAEL J. MUSKAT
SHIN-YUEH A. LEE
VINSON & ELKINS, L.L.P.
1001 Fannin Street
Houston, Texas 77002
(713) 758-2222

MARK E. WARREN
General Counsel
NCL CORPORATION, LTD.
7665 Corporate Center Drive
Miami, Florida 33126
(305) 436-4095

MICHAEL F. STURLEY
727 E. Dean Keeton Street
Austin, Texas 78705
(512) 232-1350

Counsel for Respondent

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QUESTION PRESENTED

Does Title III of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12181-12189, apply to foreign cruise ships?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent states the following:

In a corporate reorganization completed in 2004, Norwegian Cruise Line, Ltd. was sold, and certain assets and liabilities, including the defense of the instant case, were assigned to NCL (Bahamas) Ltd. d/b/a NCL. Its corporate parent is NCL International Corporation, which is owned by Arrasas, Ltd., which is owned by NCL Corporation, Ltd., which in turn is wholly owned by Star Cruises Ltd., a Bermuda company. Star Cruises Ltd. is a public company, and its shares are traded on two foreign stock exchanges. For convenience, we will continue to refer to the respondent as "Norwegian Cruise Line" or "NCL."

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INTRODUCTION

This case involves the application of a canon of statutory construction almost as old as the Republic itself: that a congressional act shall not be construed to govern a foreign ship unless Congress clearly expresses its intent for that application. In seeking to apply the Americans with Disabilities Act of 1990 ("ADA") to foreign cruise ships, petitioners cite not a word of the ADA's text or legislative history indicating that Congress intended for the Act to apply to foreign ships. Indeed, the legislative record is devoid of any such intent.

Notwithstanding the important market forces that already are achieving substantial gains for the disabled as the cruise industry makes greater and greater accommodations to attract their business, respondent Norwegian Cruise Line Ltd. ("NCL") believes that this Court should affirm the Fifth Circuit's judgment that the ADA does not apply to foreign cruise ships. At root, petitioners request that district courts, without any particular maritime expertise, be empowered to become special masters of the cruise industry in redesigning and reconstructing such ships to make all passengers – regardless of the nature of their disability – enjoy "equal access" (JA 12 (Compl. ¶ 18)) with each other.

Although cruise ships house, feed, and entertain passengers, they are quite different from land-based hotels, restaurants, and places of entertainment. Foreign ships must comply with the laws of the nation where they are registered, as well as international conventions that seek to ensure the safety of people on board. The construction, design, and equipping of ships has long been a matter for the determination of the flag state, in conjunction with applicable international conventions. Yet, under petitioners' regime, a foreign cruise ship would be obligated to comply with the domestic design and construction laws of every port nation at which they call. Such a regime is obviously impracticable. This Court has long applied a presumption that Congress intends to respect the law of a ship's registration state. And Congress itself has legislated against the backdrop of this Court's

interpretive canon by expressing specifically in numerous other statutes enacted since the nineteenth century when it intends for a law to apply to a foreign ship. The absence of any such indication in the ADA is therefore dispositive.

STATEMENT

1. NCL, a Bermuda corporation, operates a fleet of ocean-going cruise ships registered in The Bahamas that depart on pleasure cruises from ports in the United States and, at present, three other continents. NCL welcomes passengers with disabilities on its ships and is fully committed to making its many disabled passengers' cruise experiences as accessible, integrated, and enjoyable as possible. NCL rejects discrimination against its passengers in any form. Petitioners' insinuations to the contrary are unsupported by the record, unfounded in fact, and contrary to NCL's business interests. Indeed, instead of citing the bare allegations in the complaint, petitioners' brief (at 19, 23) cites "news" stories of NCL's supposed discrimination, which upon closer inspection prove to contain merely quotations of petitioners' counsel or their clients' undocumented allegations, rather than any objectively proven "fact."

Their allegations also concern two of the oldest ships in NCL's fleet, one of which, under NCL's business plan, has already been sold and the other of which will depart the fleet later this year when newer ships under construction will join the fleet. At NCL's direction, and in response to competitive market dynamics in effect throughout the cruise industry, the latest generation of ships – those built since the late 1990s – all contain wheelchair-accessible cabins and public restrooms, ramps throughout public areas of the ship, and special technical devices and innovations developed in the past decade to enhance the cruising experience for passengers with special needs. *See generally* http://www.ncl.com/more/special_services.htm. At present, NCL has 106 wheelchair-accessible cabins in its 13-ship fleet, with more being added as new ships replace older ones. The normal cabin door on a cruise ship containing approximately 1,000 cabins is

approximately 25 inches wide, whereas a 35-inch door (with additional internal space) is needed for wheelchair access. A wheelchair accessible cabin on a new cruise ship is approximately 50% larger than a regular cabin, so, for every two accessible cabins, a cruise line must sacrifice one cabin that would be occupied by paying passengers. NCL does not, however, charge more for those wheelchair-accessible cabins, but it is forced to make an economic calculation at the ship-design stage of how many such cabins to install on its ships, because the space on a ship is finite and design decisions have a profound effect on profitability. On average, less than 1% of the approximately 1,500-2,200 passengers on a typical NCL cruise have special accessibility needs.

The two NCL ships in direct issue in this litigation, the *Norwegian Star*[1] and the *Norwegian Sea*,[2] departed from the Port of Houston, traveled to various foreign ports in Mexico and the Caribbean, and returned to Houston. Both ships were registered in The Bahamas. To be registered in The Bahamas, NCL had to demonstrate compliance with a long list of international convention requirements relating to the construction, design, equipping, and manning ("CDEM") of its vessels. *See* Bahamas *Amicus* Br. 11-12. The ships in NCL's fleet have all been inspected Det Norske Veritas (DNV), one of the world's leading marine classification societies. DNV is one of the approved classification societies used by the U.S. Coast Guard. *See* http://www.uscg.mil/hq/gm/nmc/dnv.pdf.

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[1] The former *Norwegian Star*, on which one of the petitioners sailed, left the NCL fleet in 1998. The old *Star* was one of NCL's oldest and smallest ships. The current *Norwegian Star*, to which petitioners mistakenly refer in their brief (at 18, 23), is not at issue in this case. To the best of NCL's knowledge, no petitioner has sailed on it, and the complaint does not concern the new ship.

[2] Built in Finland in 1988, the *Norwegian Sea* is among the oldest and smallest (capacity of 1,518 passengers) in NCL's fleet and will be removed from the fleet in the summer of 2005.

Every NCL cruise calls at the ports of different foreign nations. NCL currently sails to 23 different foreign countries, with ships that serve in rotations that may change seasonally, sometimes in the U.S. geographical market and sometimes in other markets.[3] At those ports, depending on the nature of the port facilities and shore excursions, the cruise ship might be required to anchor some distance from shore, with passengers needing to transfer to a smaller "tender" ship for eventual passage to shore. Those means of transfer typically are not in NCL's control, but rather under the operation and management of companies based in the port nation.

2. Title III of the ADA, 42 U.S.C. §§ 12181-12189, provides that "[n]o individual shall be discriminated against on the basis of disability in the full and equal enjoyment of . . . any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." *Id.* § 12182(a). The ADA contains a lengthy and exhaustive list of "private entities [that] are considered public accommodations for purposes of this subchapter." *Id.* § 12181(7). That list includes an "inn, hotel, motel, or other place of lodging," *id.* § 12181(7)(A), and a host of other specified places, such as concert halls, restaurants, and theatres, *id.* § 12181(7)(B)-(L). Ships, foreign or domestic, are not mentioned anywhere in that text, or discussed at all in the ADA's extensive legislative history, which indicates that the 12 listed categories are intended to be "exhaustive."[4]

The ADA also prohibits discrimination in "specified public transportation" services, which is defined as "transportation

[3] At present, NCL also sails to, among other countries: Antigua/St. John's, Argentina, Barbados, Belize, Bermuda, Canada, Chile, Costa Rica, England, France, Grand Cayman, Greece, Honduras, Mexico, Norway, Peru, Portugal, Russia, Spain, St. Maarten, Sweden, Turkey, and Uruguay. *See* http://www.ncl.com/destinations/index.htm.

[4] *See* H.R. Rep. No. 101-485, pt. 3, at 54 (1990) ("These 12 listed categories are exhaustive"); *id.*, pt. 4, at 56 ("The twelve categories of entities included in the definition of the term 'public accommodation' are intended to be exhaustive").

by bus, rail, or any other conveyance (other than by aircraft) that provides the general public with general or special service (including charter service) on a regular and continuing basis." *Id.* § 12181(10). With respect to specified transportation systems, the ADA defines discrimination as "the failure of such entity to—

(A) make reasonable modifications consistent with those required under section 12182(b)(2)(A)(ii) of this title;

(B) provide auxiliary aids and services consistent with the requirements of section 12182(b)(2)(A)(iii) of this title; and

(C) remove barriers consistent with the requirements of section 12182(b)(2)(A) of this title and with the requirements of section 12183(a)(2) of this title."

Id. § 12184(b)(2).[5]

The ADA's remedial provisions authorize "injunctive relief," which "shall include an order to alter facilities to make such facilities readily accessible to and usable by individuals with disabilities to the extent required by this subchapter." *Id.* § 12188(a)(2). *See also id.* § 12188(a)(1) (incorporating 42 U.S.C. § 2000a-3(a)'s remedial provision of civil injunctive actions). Congress delayed the effective date of the ADA for 18 months to enable the Department of Justice ("DOJ") to issue implementing regulations for Title III. *Id.* § 12181. By statute, DOJ and the Department of Transportation ("DOT") had 12 months to promulgate those regulations, *id.* § 12186, so that covered entities could take six months to comply. With respect to all land-based public accommodations and the specified transportation systems, DOJ and DOT duly promulgated regulations within the statutory time frame. *See* 56 Fed. Reg. 35,592 (July 26, 1991) (DOJ); 56 Fed. Reg. 45,621 (Sept. 6, 1991) (DOT). Neither agency has ever

[5] Section 12182(b)(2)(A)(ii) and (iii) defines discrimination in terms of affording persons with disabilities an opportunity to participate in benefits and providing separate benefits that are comparable to the non-disabled.

issued proposed, draft, or final rules with respect to cruise ships.[6]

3. After sailing aboard the old *Norwegian Star* and the *Norwegian Sea*, petitioners filed this putative class action on behalf of all "current and former" passengers of all NCL cruises who are mobility impaired or who had a "known association" with mobility-impaired passengers during the cruise. JA 13 (Compl. ¶ 23). Petitioners allege that they have physical impairments that interfere with their ability to walk. JA 9 (Compl. ¶ 6). They further allege that they were denied "full and equal access to NCL services or . . . were discriminated against because of their known association with persons who utilize wheel chairs or scooters for mobility." JA 13 (Compl. ¶ 21). They also contend that NCL's foreign cruise ships are governed by Title III of the ADA and that Title III requires NCL to modify the physical structure of each of its ships.[7] Although the complaint itself merely asks for NCL to "remove architectural barriers when it is readily achievable to do so" (JA 17 (Compl. ¶ 41(3))), petitioners represent that their complaint seeks modifications to the

[6] On November 26, 2004, just days before the topside briefs in this case were due, the Architectural and Transportation Barriers Compliance Board ("Access Board") issued a Notice of Availability of Draft Guidelines. *See* 69 Fed. Reg. 69,244. That same day, DOT issued a related Advance Notice of Proposed Rulemaking. *See* 69 Fed. Reg. 69,246. As DOJ has noted with respect to analogous Access Board guidelines, these types of guidelines "have no legal effect on the public." 70 Fed. Reg. 2992 (Jan. 19, 2005) (discussing Access Board revised guidelines). Petitioners misunderstand the import of these "proposed guidelines" when referring to them as "[n]ewly proposed regulations." Pet. Br. 10. The ANPRM does not contain any "rules," nor even any "proposed rules."

[7] On the same day they filed this case, petitioners sued NCL and three unaffiliated travel agencies in a putative class action in Texas state court claiming damages based on allegations of misrepresentations, fraud, and violations of the Texas public accessibility law. The state court denied petitioners' motion to certify the class (*Spector v. Norwegian Cruise Line Ltd.*, No. 01-02-00017-CV, 2004 WL 637894, at *3 (Tex. App.–Hous. (1st Dist.) Mar. 30, 2004)), and the case is proceeding with the named plaintiffs only.

ships' cabins, restaurants, swimming pools, restrooms, elevators, and other unspecified structures. Pet. 4. Such claims seek physical and permanent reconstruction of the interior of NCL's ships, and entail either the condition of the ships or onboard activities.[8] In the court below, petitioners represented that their complaint entitles them to an injunction ordering NCL to provide "accessible passage" for "shore excursions" in foreign ports. *See* Pet. C.A. Br. 7.

In addition to their direct efforts to obtain injunctive relief that would necessitate substantial modifications to NCL's ships, petitioners also challenge an NCL pricing policy that would have significant architectural consequences. NCL offers passengers a "run-of-the-ship" pricing offer. Under that offer, a passenger pays a set price and is given the best room still available at the time of sailing. The passenger may get a large room at a discount or pay more for a smaller room. Although petitioners appear not to have sought to take advantage of this offer, and thus would not appear to have standing to complain about it, they nonetheless contend (at 17-20) that NCL's special offer is price "discrimination" between disabled and non-disabled passengers. Petitioners do not appear to allege, however, that a non-disabled passenger would pay less to book the class of room that any petitioner purchased.[9]

[8] In their opening brief (at 8, 21), petitioners for the first time in this litigation claim they were denied restroom facilities while waiting to board in the Port of Houston. Even if this new allegation were true, NCL does not own or manage the Houston port facilities, and thus would not be responsible for them under Title III. *See* 42 U.S.C. § 12182(a).

[9] Petitioners' effort to separate NCL's so-called "on-land pricing policies" from its onboard activities also misunderstands the scope of Title III. NCL's policies could not violate Title III unless they relate to "place[s] of public accommodation," 42 U.S.C. § 12182(a), or "specified public transportation services," *id.* § 12184(a), as those terms are defined by the statute. The only policies challenged here relate to the onboard activities on the *Norwegian Star* and the *Norwegian Sea*. In any event, this argument has been waived, *see* Resp. Cert. Br. 11 n.8, as even the government recognizes by the wording of its question presented, *see* Gov't Br. i.

4. In the district court, NCL moved to dismiss petitioners' complaint for failure to state a claim. NCL argued that Title III does not govern foreign ships because there is no evidence that Congress intended the statute to apply to them. NCL also argued that applying Title III to foreign ships conflicts with comity principles and creates potential substantive conflicts with international conventions and foreign law. In the alternative, NCL contended that petitioners' claims seeking the removal of structural barriers on NCL's ships must be dismissed because the federal agencies charged with promulgating architectural and design standards under Title III have not established any standards for ships – despite having had more than a dozen years to do so. Given the procedural context, NCL did not raise the issue whether Title III applies to cruise ships generally, regardless of the ship's national registry. (The court of appeals did not address the issue, *see* Pet. App. 4a n.3, which has not been conceded by NCL and is not before this Court.)

The district court relied on *Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237 (2000), *reh'g denied*, 284 F.3d 1187 (CA11 2002), to hold that Title III applies to foreign ships within U.S. territorial waters. Pet. App. 35a. The court nevertheless dismissed petitioners' barrier-removal claims, recognizing that the lack of architectural standards specific to ships destroys Congress's goal in Title III of establishing uniformity for design and structural aspects of public accommodations. *Id.* at 42a. The court certified its order for interlocutory appeal, identifying two controlling questions of law: "(1) whether federal agencies' failure to create guidelines for new construction or alterations of cruise ships bars enforcement of Title III of the ADA's existing barrier removal guidelines; and (2) whether Title III of the ADA applies to foreign-flagged cruise ships." Resp. Cert. Br. App. 4.[10]

[10] The courts below referred to the ships at issue as "foreign-flagged ships" or "foreign-flagged cruise ships." In this brief, NCL uses the more concise term "foreign ships," which has the same meaning, *i.e.*, ships registered in a foreign country.

5. The Fifth Circuit held that Title III does not apply to foreign ships. The court observed that, although the United States has the power to subject foreign ships to its laws, whether it exercises that power is within Congress's discretion. Pet. App. 4a-5a. For a court to apply a statute to a foreign ship, it must find specific and clear evidence in the statute or its legislative history indicating Congress's intent to do so. *Id.* at 7a-8a (citing *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963)). As the court of appeals explained, "Congress's silence cannot be read to express an intent to legislate where issues touching on other nations' sovereignty are involved." *Id.* at 8a. The court further found no evidence that Congress intended for Title III to apply to foreign ships. *Id.*

The court also noted the potential conflict between the requirements of Title III and the International Convention for the Safety of Life at Sea ("SOLAS"), Nov. 1, 1974, 32 U.S.T. 47, T.I.A.S. No. 9700, which governs maritime architecture. *See* Pet. App. 8a-9a. The possibility of conflict between Title III and SOLAS, the court ruled, indicated that Title III should not be interpreted to include foreign ships. *Id.* at 9a. The court concluded that the permanent modifications to ship structure and policies sought by petitioners would necessitate an extraterritorial application once the ships left U.S. waters. *Id.* at 11a-13a. The court held that such an application of U.S. law would be impermissible because it found no evidence that Congress intended the statute to apply extraterritorially. *Id.* at 7a-8a.

6. Because the conflict between the Fifth and Eleventh Circuits made it impossible for NCL to know its legal obligations, NCL acquiesced to the petition for a writ of certiorari.

SUMMARY OF ARGUMENT

For centuries, the world's maritime nations have consistently recognized that legal issues involving ships are presumptively governed by the law of the country of registration, commonly known as "the law of the flag." This fundamental principle is based not only on a mutual respect for each nation's sovereignty, but also on the practical need to provide consistent regulation of ships in commerce that regularly enter the territorial waters of many different countries. Such consistent regulation is maintained through international treaties and the obligations of the flag states thereunder. If port nations usurp the position of flag states in the regulation of shipping, the international treaties will be undermined as flag nations will no longer be primarily responsible for the ships they register.

The United States has recognized that it must act carefully in legislation intended to apply to foreign ships. This Court has thus consistently held that Congress must speak clearly if it intends for a U.S. domestic statute to apply to foreign ships. Absent that clear statement, this Court's cases hold that application to foreign ships will not be inferred, so as to avoid conflict with the nation of registry. Congress has an extensive history of clearly stating in its legislation when the law is to apply to foreign ships. The same Congress that enacted the ADA without any such indication, for example, extensively debated whether to apply the Oil Pollution Act of 1990 to foreign ships. In finally deciding to do so, Congress provided extensive guidance to the federal agencies charged with enforcing the Act on how those agencies should coordinate their efforts in light of foreign treaties and the laws of other flag nations. By contrast, Congress gave no indication of any kind that the ADA should apply to foreign ships.

Petitioners propose a rule that, unless Congress states otherwise, a U.S. domestic law should be read to apply to foreign ships that enter U.S. waters. This argument contradicts the purpose of the international treaty system for regulation of the high seas and ignores flag-state sovereignty. In effect,

petitioners urge this Court to establish, for interpreting congressional acts, an automatic law of unintended consequences on an international scale. Perhaps because no decision of this Court has ever adopted petitioners' breathtakingly broad and inexact balancing test, petitioners ignore that this case simply requires determining Congress's intent under a canon holding that interference with the law governing a foreign ship will not be inferred absent a clear expression of such intent.

ARGUMENT

I. U.S. STATUTES DO NOT APPLY TO FOREIGN SHIPS ABSENT CLEAR, SPECIFIC EVIDENCE OF CONGRESSIONAL INTENT

A. The Law Of The Registration Country ("Flag State") Presumptively Governs Ships

Under this Court's precedents, it is the "well-established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship." *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21 (1963). That rule is of ancient origin. *See, e.g., Wildenhus's Case*, 120 U.S. 1, 12 (1887); *The Schooner Exchange*, 11 U.S. (7 Cranch) 116, 143 (1812); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 120-21 (1804). *See also Lauritzen v. Larsen*, 345 U.S. 571, 583 (1953) ("Perhaps the most venerable and universal rule of maritime law is that which gives cardinal importance to the law of the flag.").

The content of that "law of the flag state" has also long been understood and articulated by this Court. The broad scope of the presumption that domestic statutes do not apply to foreign ships is well illustrated by *Brown v. Duchesne*, 60 U.S. (19 How.) 183 (1857), in which this Court refused to apply U.S. patent laws to a French ship docked in the port of Boston. The ship was fitted with equipment for which Brown held the U.S. patent, so he brought an infringement action against the master. The Court recognized that the case turned "on the construction of the patent laws," *id.* at 194, as the United States undoubtedly had the power – if it chose to

exercise it – to enforce its laws against the ship, *id.* The Court considered the exact same argument made by petitioners here: "[t]he general words used in the [statute], taken by themselves, and literally construed, . . . would seem to sanction the claim of the plaintiff." *Id.* But the Court rejected this unduly literal approach, which "has never been adopted by any enlightened tribunal," *id.*, and demanded "plain and express words indicating that such was the intention of the Legislature" before it would extend the statute so broadly, *id.* at 195. To avoid "seriously embarrass[ing] the commerce of the country with foreign nations," *id.* at 197, and "embarrass[ing] the treaty-making power in its negotiations with foreign nations," *id.*, the Court held that the patent law "does not extend to a foreign vessel lawfully entering one of our ports," *id.* at 198. The Court reasoned that "these acts of Congress do not, and were not intended to, operate beyond the limits of the United States." *Id.* at 195. Although the Court did not doubt that Congress had such power, it was "satisfied that no sound rule of interpretation would justify" the Court in extending "the general words used in the patent laws" to "a foreign vessel lawfully entering one of our ports." *Id.* at 198.

As Justice Curtis explained, in the circuit court opinion that this Court unanimously affirmed: "[B]y the general consent of civilized states, the vessels of one nation, though within the ports of another, carry with them the laws of their country, which still govern the rights, duties, and obligations of those on board; and that to the extent of this latter jurisdiction, and for the purpose of enabling it to exist, the vessel is deemed to be a part of the territory of the nation to which it belongs." *Brown v. Duchesne*, 4 F. Cas. 369, 370 (C.C.D. Mass. 1855) (No. 2,004). This Court has subsequently ratified the notion that the law of the state of registration, not the law of the forum, generally determines the substantive law that governs the ship. *See Lauritzen*, 345 U.S. at 585; *Ross v. McIntyre*, 140 U.S. 453, 478-79 (1891). The Court has further explained the rationale for that longstanding rule as

resting on the registration state's regulatory control over the ship wherever it sails. *See Lauritzen*, 345 U.S. at 578-79; *United States v. Flores*, 289 U.S. 137, 156-57 (1933).

By international agreement, that regulatory control exercised by the flag state embraces a range of critical responsibilities. The flag state has the obligation to assure that its ships comply with international duties concerning matters such as protection of life at sea. *See* Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 520, LOS Commentary, Arts. 94, 98 (entered into force September 30, 1962) ("1958 Convention"). With language identical to that of the 1958 Convention, the 1982 Convention on the Law of the Sea, Dec. 10, 1982, U.N. Doc. A/CONF. 62-122 ("UNCLOS 1982"), also recognizes the responsibility of the flag state for regulating and implementing any changes to the physical aspects of a vessel. *See* Art. 94, § 3(a).[11] It has thus become the accepted customary international law recognized by the United States that the flag state is charged with "adopting and enforcing laws to protect the welfare of the crew *and passengers* aboard a ship and to maintain good order thereon," and for ensuring safety at sea with regard to "the construction, equipment and seaworthiness of ships." *Restatement (Third) of Foreign Relations Law* § 502 cmt. a,

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[11] While UNCLOS 1982 was not ratified by the United States as a result of an earlier dispute concerning deep sea mining issues, the United States expressly noted that the document otherwise conformed with customary international law. *See* Ronald W. Reagan, Statement on United States Ocean Policy, 19 Weekly Comp. Pres. Doc. 383 (Mar. 10, 1983) (noting conflict with mining provisions, while maintaining that "the convention also contains provisions with respect to traditional uses of the oceans which generally confirm existing maritime law and practice and fairly balance the interests of all states"). The adherence of the United States to the non-mining portions of the 1982 Convention was reiterated in President Clinton's transmittal letter on October 7, 1994. *See* S. Treaty Doc. No. 39, 103d Cong., 2d Sess. III (1994) ("following adoption of the convention in 1982, it has been the policy of the United States to act in a manner consistent with its provisions relating to traditional uses of the oceans and to encourage other countries to do likewise").

b(1) (1987) ("*Restatement*"). These responsibilities do not ebb and flow depending on the location of the ship; rather, they "continue at all times, wherever the ship is located." *Id.*, cmt. a. *See generally id.* § 502 cmts.

That rationale does not rest on the particular nationality of a ship's registration. Neither Congress nor this Court has ever distinguished among ships flying the flags of open registry countries[12] and those of other flag countries in accepting the basic proposition that the law of the flag state governs internal operations aboard the vessel.[13] *See Lauritzen*, 345 U.S. at 584 ("Each state under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it. . . . The United States has firmly and successfully maintained that the regularity and validity of a registration can be questioned only by the registering state."). *See also* 106 Cong. Rec. 1189, 1190 (1960) ("no state can claim the right to determine unilaterally that no genuine link exists between a ship and the flag state"); 9 Marjorie Whiteman, *Digest of International Law* 14-15 (1968).

Notwithstanding petitioners' criticism (at 31), the United States has long accepted this idea. Indeed, the United States went to war in 1812 to vindicate the principle that the flag state's law governed the ship. *See Ross*, 140 U.S. at 478. The effect of the War of 1812 and the development of the

[12] An open registry nation is one that allows ships owned by non-citizens of that nation to become a member of the nation's registry. This open registry does not automatically equate to a flag of convenience as is shown in the brief of The Bahamas (at 10-11), which is an open registry nation but not a flag of convenience.

[13] The United States has recognized the need for respect for the flag nation regardless of whether the flag is of open registry or not. The United States opened its own registry and expected other nations to respect its flag when it re-registered Kuwaiti ships sailing in the Persian Gulf in 1987. *See* "U.S. Policy in the Persian Gulf," *U.S. Dep't of State Bulletin*, Oct. 1987.

law led other nations, including Great Britain, clearly to acknowledge the sovereignty of the flag state. Following a careful study of the subject, even the English courts, per Justice Blackburn, came to accept as settled international law that, "where a ship is sailing under a particular flag, the flag affords protection to all who sail under it, and the nation to which the flag belongs has the perfect right to legislate for all those on board." *Regina v. Anderson*, 1 L.R.C.C. Res. 161, 169 (1868). This Court should not assume that the United States' current global dominance caused Congress to ignore without comment the principle of respect for the flag to the detriment of smaller nations such as The Bahamas.

B. The United States Does Not Encroach On The Law Of The Flag State Unless Congress Clearly Expresses Its Intent To Do So

This Court has held that, to apply a U.S. domestic law to foreign vessels entering U.S. waters, "there must be present the affirmative intention of the Congress clearly expressed." *Benz*, 353 U.S. at 147. *See also McCulloch*, 372 U.S. at 17-20; *Brown*, 60 U.S. at 195-98. The question in this case, therefore, does not concern the *power* of Congress to so legislate, but rather whether "Congress in fact exercised that authority." *EEOC v. ARAMCO*, 499 U.S. 244, 248 (1991).

In cases that are directly analogous, this Court has found that, where Congress made no expression of the requisite intent, the presumption against applying a statute to a foreign ship governed. In *Benz*, this Court refused to apply the Labor Management Relations Act, 1947 ("LMRA") to picketing in connection with the employment practices on a foreign ship while the vessel was temporarily in a U.S. port. 353 U.S. at 143-44. That holding rested on the absence of an expressed intent to so apply the statute:

> The parties point to nothing in the Act itself or its legislative history that indicates in any way that Congress intended to bring such disputes within the coverage of the Act .... In fact, no discussion in either House of

> Congress has been called to our attention from the thousands of pages of legislative history that indicates in the least that Congress intended the coverage of the Act to extend to circumstances such as those posed here. It appears not to have even occurred to those sponsoring the bill.

Id. The Court contrasted the LMRA with other statutes in which Congress *had* specifically evinced an intent for the statutes to be applied to foreign ships, but found that "such a 'sweeping provision' as to foreign applicability was not specified in the [LMRA]." *Id.* at 146 & n.7 (citing *Brown*, 60 U.S. at 197).

Likewise, in *McCulloch*, which addressed whether the National Labor Relations Act ("NLRA") applied to foreign ships, this Court again emphasized that the decisive question was not whether Congress had the power to apply the NLRA to foreign ships, but whether Congress had chosen to do so. *See* 372 U.S. at 17. The *McCulloch* plaintiffs asserted that their case, unlike *Benz*, involved "a fleet of vessels not temporarily in the United States waters but operating in a regular course of trade between foreign ports and those of the United States." *Id.* at 19-20. But this Court rejected that argument because the plaintiffs were "unable to point to any specific language in the Act itself or in its extensive legislative history that reflect[ed] such a congressional intent." *Id.* at 20. Accordingly, the Court held that the NLRA did not apply to foreign ships, and it reiterated that the plaintiffs should petition "to the Congress rather than to us." *Id.* at 22.

C. Non-Interference With The Law Of Foreign Ships Is Complementary To The General Canon That Laws Do Not Apply Extraterritorially Absent A Clear Statement

The foregoing canon of construction against interference with the law of a ship's registration state is akin to a more general canon that this Court has long applied and that is also relevant here: ambiguous statutes that may interfere with the laws of other nations are presumed not to apply outside the

United States' territorial jurisdiction. *See, e.g., F. Hoffman-Laroche, Ltd. v. Empagran, S.A.*, 124 S. Ct. 2359, 2366 (2004) (citing *McCulloch*, 372 U.S. at 20–22; *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 382-83 (1959); *Lauritzen*, 345 U.S. at 578). This rule of construction reflects principles of customary international law that this Court has found Congress ordinarily seeks to follow. *Id.* (citing *Restatement* §§ 403(1), 403(2) (limiting the unreasonable exercise of prescriptive jurisdiction with respect to a person or activity having connections with another State)). *See also Foley Bros. Inc. v. Filardo*, 336 U.S. 281, 285 (1949).

ARAMCO best illustrates this Court's approach to extraterritorial statutory effects. That case involved an attempt to apply Title VII of the Civil Rights Act of 1964 to conduct between Americans on foreign soil.[14] As with foreign ships, a presumption against applicability protects against unintended clashes with another nation's exercise of its sovereign powers. *Compare ARAMCO*, 499 U.S. at 248 (noting that the presumption against extraterritoriality "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord") *with Benz*, 353 U.S. at 147 (noting the possibility of "international discord" resulting from the application of U.S. statutes to foreign ships).

The close analogy between these two situations is further demonstrated by *ARAMCO*'s reliance on *McCulloch* and *Benz*. Notably, *ARAMCO* described *McCulloch* as refusing to apply the NLRA "overseas" and "abroad," 499 U.S. at 251 (citing *McCulloch*, 372 U.S. at 19), even though the basis for the proposed application of the NLRA was that the ships

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[14] The government (at 21) deals with *ARAMCO* by arguing that petitioners' claims concern only the application of U.S. law to U.S. territory. This argument is flatly inconsistent with petitioners' claims for an injunction that requires permanent structural changes to NCL's ships and "accessible passage" for "shore excursions" in foreign ports. *See supra* pp. 6-7.

docked in U.S. ports. The *ARAMCO* Court also cited *McCulloch* to support its reasoning that the presumption against extraterritoriality serves to avoid international discord. *Id.* at 248 (citing *McCulloch*, 372 U.S. at 20-22). *ARAMCO* rested on *Benz* as articulating the test to determine when a statute may be applied extraterritorially. *Id.* (citing *Benz*, 353 U.S. at 147, for the proposition that there must be "the affirmative intention of the Congress clearly expressed").

Ultimately, those cases demonstrate that *Congress's silence has never been read to express an intent to legislate when issues touching on other nations' sovereignty are involved.* "[U]nless there is the affirmative intention of Congress clearly expressed, we must presume it is primarily concerned with domestic conditions." *Id.* (quotations omitted).

D. The "Clear Statement" Rule Embodies Comity Concerns Especially Important To Foreign Ships

This Court has explained that comity is the important principle served by construing domestic legislation not to apply to foreign ships or extraterritorially absent a clear expression of such intent. That canon of construction "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *ARAMCO*, 499 U.S. at 248 (citing *McCulloch*). *See also Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 817 (1993) (Scalia, J., dissenting) (identifying rule of construction as derived from the principle of "prescriptive comity"). Because such interpretations of statutes concern whether Congress intended to exercise American power, the Court has been particularly sensitive to such interpretations, especially where the power "is not mandatory but discretionary . . . [and] . . . [o]ften, because of public policy or for other reasons, the local sovereign may exert only limited jurisdiction and sometimes none at all." *Benz*, 353 U.S. at 142.

The United States adheres to those principles in part so that other countries will not attempt to retaliate against U.S.

interests. *See Lauritzen*, 345 U.S. at 578-82. From its earliest years, the United States has recognized that the Nation's economic well-being rests on the free flow of commerce in international shipping. Although the tides have ebbed and flowed for the U.S. merchant marine, the United States has not wavered in its interest in avoiding undue interference with international shipping and the operation of ships of other nations. Even in the areas in which Congress has chosen to be most involved in regulating foreign ships, *i.e.*, pollution control and national security, Congress has demonstrated its awareness of the potential for conflict with international relations and existing treaties and, specifically, the relations with those countries whose registered ships visit U.S. waters. *See infra* pp. 29-34. Thus, rather than apply its individual domestic laws generally to all foreign ships, the United States adheres to the law-of-the-flag principle absent congressional indications to the contrary.

E. Application Of The ADA To Foreign Ships Poses Significant Risks Of Inconsistent Laws

Ocean-going ships are unique in that they typically transact business in the ports of several nations, and thus could be subject to multiple – and perhaps conflicting – sets of laws. *See Lauritzen*, 345 U.S. at 585 ("[T]here must be some law on shipboard, . . . it cannot change at every change of waters, and no experience shows a better rule than that of the state that owns her"). During its lifetime of approximately 30 years, a cruise ship will visit many ports. The *Norwegian Sea*, for example, has called at Houston, Miami, and ports in Mexico, the Caribbean, and South America during the limited period covered by this lawsuit. Given the peripatetic nature of cruise ships, there is a potential that they may be subject to inconsistent results and injunctive orders from various courts pertaining to the operation and structure of the ship.

Cruise ships are not simply floating hotels that can be renovated in one portion of the ship while passengers enjoy the rest of its accommodations. Restructuring must be done while the ship is docked. Indeed, given the complexity of

cruise ships, with literally miles of passageways, thousands of cabins and rooms, and hundreds of doorways on 10 or more decks, the application of Title III to cruise shipping has the potential to have a far greater impact than does application to the public accommodations listed by Congress in the Act. In most circumstances, only companies experienced in maritime construction can undertake extensive structural changes. And any such changes that would need to be made to comply with whatever ADA requirements a district court would impose must also satisfy international safety and flag-state requirements. This usually means that the ship must sail to another port, typically to a country such as Germany, Italy, France, or Finland, where virtually all cruise ships are built and where ADA-compliant engineering standards are not mandated.

By contrast, when uniformity and cooperation for ship standards have been deemed desirable, the United States and other nations have developed a body of international law and reciprocal standards to protect their shared concerns, which include aspects of the design and maintenance of ocean-going ships. *See United States v. Locke*, 529 U.S. 89, 102 (2000). Congress, for example, has expressed support for respect of other nations' laws and international treaties in the important area of pollution control. In *Locke*, the U.S. government advised this Court that the scheme of regulation under a series of treaties and statutes depended on reciprocity in that the United States would allow entry into its ports of ships whose flag nations have warranted their compliance with international standards. *See id.* (noting that "the certification of a vessel by the government of its own flag nation warrants that the ship has complied with international standards, and vessels with those certificates may enter ports of the signatory nations") (citing U.S. brief). There is no reason for this Court to apply a different approach to cruise ships.

The primary body of international law setting out standards governing the concerns of proper design, maintenance, and

safety of ocean-going ships is SOLAS.[15] First adopted in 1914 in response to the *Titanic* disaster, new versions of SOLAS were adopted in 1929, 1940, 1960, and 1974. The 1960 version was the first major task of the International Maritime Organization ("IMO") after that organization was created.[16] International treaties and agreements such as SOLAS are instrumental for the United States to allow for uniformity and avoid conflict between sets of standards that would frustrate maritime commerce and heighten tensions in foreign relations.

Because the Title III barrier-removal provisions may govern the most minute details of maritime architecture in the

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[15] One hundred fifty-five countries, including the United States and The Bahamas, have ratified SOLAS. *See* IMO's "Status of Conventions – Summary," *available at* http://www.imo.org/Conventions/mainframe.asp?topic_id=247 (last visited Jan. 27, 2005), and IMO's "Status of Conventions by Country," *available at* http://www.imo.org/includes/blastDataOnly.asp/data_id%3D11061/status.xls (last visited Jan. 27, 2005).

[16] In 1948, the United Nations established the IMO (originally called the Inter-Governmental Maritime Consultative Organization ("IMCO")) to develop uniform international shipping laws and regulations. *See* Convention on the International Maritime Organization, Mar. 6, 1948, 9 U.S.T. 621, 289 U.N.T.S. 48, as amended. Its primary function is to avoid the uncertainty that *Lauritzen* noted would be the probable outcome of *ad hoc* regulation by individual nations: "Because of the international nature of the shipping industry, it has long been recognized that action to improve safety in maritime operations would be more effective if carried out in an international level rather than by individual countries acting unilaterally and without coordination with others." International Maritime Organization, *IMO: What It Is, What It Does, How It Works* 3 (1998). IMO's 158 member states represent more than 98% of the world merchant shipping tonnage. Each year, IMO member states, including the United States, send delegations to a wide variety of IMO meetings, most of which are technical in nature. In addition, technical committees are often appointed to continue work between plenary sessions. By this means, conventions are developed and ultimately approved and sent to governments for ratification. More than 40 conventions and protocols have been adopted in that manner, together with more than 800 codes and sets of recommendations that complement the treaties.

quest of ships fully accessible to disabled passengers, those provisions pose a stark likelihood of conflicts with SOLAS. SOLAS is not a static treaty. Rather, it can be and has been quickly amended. The IMO intends SOLAS to stay up-to-date with technical developments in the shipping industry. Under a procedure adopted in 1974, a proposed amendment goes into effect after a set date unless a specified number of parties to the Convention object. That process enables SOLAS to be amended frequently.

The IMO's Maritime Safety Committee ("MSC") has already issued specific accessibility recommendations for vessels.[17] The MSC Guidelines, designed to facilitate "the integration of elderly and disabled persons," address, *inter alia*, elevator configuration, door width, stairway color and construction, accessible seating, hand-rail dimensions and color, cabin configuration, and toilet and bathroom configuration. MSC Guidelines §§ 7-16. Because of The Bahamas' adherence to IMO standards, NCL *must* comply with those standards irrespective of whether they are consistent with whatever a district court might order under the ADA.

[17] *See* MSC Circ. 735, "Guidelines for the Design and Operation of New Passenger Ships To Respond to Elderly and Disabled Persons' Needs" (1996) ("MSC Guidelines"), *available at* http://www.uscg.mil/hq/g-m/nmc/imo/pdf/Circ1/Msc0/735an.pdf (last visited Jan. 27, 2005). These guidelines state that the recommendations apply to the design and operation of new passenger ships, with an emphasis on passenger ferries, which are part of the public transport system. While the documents note that ferries and cruise ships should be considered separately and that the priority application for the present standards is passenger ferries, the guidelines clearly evidence the intention of the IMO to apply its own broad set of accessibility standards to passenger vessels, including cruise ships. Furthermore, the issue before this Court also relates to foreign ferries that operate in U.S. waters. For example, in *Disabled Americans For Equal Access, Inc. v. Ferries Del Caribe, Inc.*, 329 F. Supp. 2d 209 (D.P.R. 2004), it was argued that Title III should apply to a foreign ferry sailing between Puerto Rico and the Dominican Republic.

F. Petitioners' Arguments For Ignoring The Clear Statement Canon Are Unpersuasive

Petitioners offer a laundry list of arguments, which make basically three assertions: (1) the Court has supposedly recognized a nationality of passenger distinction in deciding whether Congress intended a statute to apply to a foreign ship; (2) the Court has determined that certain statutes (*e.g.*, Prohibition Act) apply to foreign vessels, and the ADA is no different; and (3) because (petitioners assert) they are asking for the ADA to apply only in U.S. territorial waters, the normal rules of port state control should apply. Those arguments are unpersuasive.

1. Petitioners' effort to limit the *McCulloch-Benz* presumption based on a nationality of passenger distinction is unpersuasive

Petitioners argue (at 36-39) that the presumption limiting the scope of domestic statutes to exclude foreign ships is inapplicable here because the plaintiffs in *Benz* and *McCulloch* were seeking to apply U.S. labor laws to foreign crews, whereas petitioners claim to be requesting that a U.S. statute be applied to "American passengers." Pet. Br. 37.

First, none of this Court's cases cited by petitioners supports the proposition that the law operates like a hermetic seal around certain individuals (but not others) who come into contact with foreign ships. That was not, in fact, the basis on which the Court decided any of those cases. Indeed, the Court rejected that very assumption in *Brown*, in which it held that a U.S. citizen did not get the benefit of U.S. patent laws when a French ship was in Boston harbor. *See supra* pp. 11-12. In that case, this Court rejected virtually all of the general statutory arguments that petitioners advance here. Petitioners neither cite nor discuss *Brown*, which formed the doctrinal underpinning of *Benz*. *See* 353 U.S. at 146 n.7. *See also ARAMCO*, 499 U.S. at 255-59 (holding that Title VII does not protect U.S. citizens working overseas).

Second, even if *Benz* and *McCulloch* were the only relevant cases, there would be no basis for limiting them to their specific facts. A labor regulation on a merchant ship is not materially different from a passenger-accessibility regulation on a cruise ship. As important as a crew is to a merchant ship, passengers are even more important to a cruise ship. The entire design, construction, maintenance, and operation of a cruise ship is tied to its relationship to the passengers.

Third, the fact that *Benz* and *McCulloch* involved the working conditions of foreign crews was significant in part because these conditions were already governed by the flag state's laws, thus creating the potential for a conflict. That fact sustained the Court's conclusion that Congress likely had no intent to apply U.S. labor statutes to foreign ships absent any expression of an intent to do so. *See McCulloch*, 372 U.S. at 20; *Benz*, 353 U.S. at 144.

The same potential for conflict and lack of any congressional intent exists here. Just as the working conditions of foreign crews on foreign ships have historically been governed by the laws of the flag state, so too have issues regarding the structure of the ship and the safety and security of passengers. *See supra* pp. 13-14; *see also* Bahamas *Amicus* Br. 24-26. Moreover, the existence of international regulations creates additional possibilities for conflict. *See supra* pp. 19-20. And, just as in *Benz* and *McCullough*, there is no evidence that Congress intended to apply the ADA to foreign ships. *See supra* pp. 15-16; *infra* p. 29. In neither situation is there a justification for simply presuming, as petitioners do, that Congress meant to intrude in these sensitive areas.

Petitioners' reliance (at 30-31, 38-39) on *International Longshoremen's Local Union No. 1416 v. Ariadne Shipping Co.*, 397 U.S. 195 (1970), is misplaced. That case involved *no* conduct or conditions onboard a foreign ship at all. *Ariadne* held merely that the NLRA covered picketing in support of U.S. workers who did "short-term, irregular and casual" *longshore* work for a foreign ship docked in a U.S. port. *Id.* at 199-200. Because the case did not concern the

conduct or conditions on the ship, *Ariadne* did not raise the potential for the intrusion of U.S. law upon matters traditionally governed by the flag state. *Id.* at 200. By contrast, in cases where on-shore labor activity *does* potentially affect those matters, this Court has refused to apply the NLRA. *See McCulloch*, 372 U.S. at 19; *Benz*, 353 U.S. at 147.

That principle of avoiding conflict explained this Court's refusal to apply U.S. domestic laws to foreign ships when to do so would affect their "maritime operations" by increasing their operating costs. In *Windward Shipping (London) Ltd. v. American Radio Association*, 415 U.S. 104 (1974), the Court refused to apply the NLRA to picketing of foreign ships by U.S. labor unions. The picketing was designed to force foreign ships to increase operating costs, either through wage increases to the foreign crew or refusals by U.S. longshoremen to unload the cargo. *Id.* at 114. The Court noted that this increase in operating costs would "have more than a negligible impact on the 'maritime operations' of these foreign ships, and the effect would by no means be limited to costs incurred while in American ports." *Id.*[18] Citing *Benz*, the Court refused to apply the statute. *Id.* at 114-15. *See also American Radio Ass'n v. Mobile S.S. Ass'n*, 419 U.S. 215, 224-25 (1974) (refusing to apply NLRA to picketing of foreign ships that had caused stevedores to decline to load and unload the ships; as in *Windward*, this activity would detrimentally affect the ships' maritime operations).[19]

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[18] The Court distinguished *Ariadne*, which had involved only a union's attempt to raise the wages of U.S. dockworkers hired by a foreign ship while it was in a U.S. port. 415 U.S. at 112, 114.

[19] The frequency of a foreign ship's visits to U.S. ports does not change the analysis of the application of an Act of Congress. *See McCulloch*, 372 U.S. at 18-19. "[T]he virtue and utility of sea-borne commerce lies in its frequent and important contacts with more than one country. If, to serve some immediate interest, the courts of each were to exploit every such contact to the limit of its power, it is not difficult to see that a multiplicity of conflicting and overlapping burdens would blight international carriage by sea." *Lauritzen*, 345 U.S. at 581.

2. *Cunard* does not involve the presumption at issue here

Ignoring *ARAMCO*, petitioners instead rely heavily on *Cunard Steamship Co. v. Mellon*, 262 U.S. 100 (1923), which involved the scope of the Prohibition Act. Although petitioners assert that this Court applied the Prohibition Act to foreign ships simply because there was no explicit "exception" made for foreign ships, Pet. Br. 30, this reading is unfounded. In fact, *Cunard* supports *NCL*'s position.

Cunard does not involve the presumption against applying a domestic statute to a foreign ship. Rather, this Court determined that Congress unmistakably *had* intended the Prohibition Act to apply to foreign ships. For example, Congress specifically exempted transportation by ships through the Panama Canal Zone, which would have been unnecessary if the Act did not generally apply to all ships operating in U.S. waters. *See* 262 U.S. at 127-29. Thereafter, an amendment to the Act made it clear that alcohol was not a legitimate sea cargo. *Id.* at 130. Given the specific and general terms of the Act prohibiting importation and exportation of alcohol, the Court found that Congress clearly intended the Act to apply to all ships, foreign or domestic, operating in U.S. waters. *Id.* at 128-29. *Cunard* also found that Congress did not intend for the Act to apply to ships operating outside of U.S. waters. *Id.*

A core purpose of the Prohibition Act was to prevent the importation of liquor into the United States as a means of evading the statute's restrictions on the manufacture of liquor. The text itself stated that "[n]o person shall . . . sell, barter, transport, [or] *import* . . . any intoxicating liquor . . . , and all provisions of this act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented." 262 U.S. at 126 (emphasis added). An amendment clearly stated that its coverage applied to "*all territory subject to [the] jurisdiction*" of the United States. *Id.* at 127 (emphasis added). The Court noted that the statutory language was modeled after the language of the Eighteenth

Amendment, *id.* at 126, which stated that "the transportation of intoxicating liquors within, [and] the importation thereof into, . . . the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited." *Id.* at 121. Only after making note of such expressions did the Court state that no exception for foreign ships had been made, as such an exception would defeat the statute's "obvious purpose." *Id.* at 126. Moreover, application of the Prohibition Act did not force any changes in the construction, design, or equipping of the ship or its crew, unlike the permanent structural changes sought by petitioners.

By contrast, nothing in Title III gives any indication that it was Congress's purpose, or even on Congress's mind, that Title III would regulate the structure, design, and policies of ships – foreign or not. *See infra* p. 29.

3. The port state control cases are also inapposite

Petitioners and their supporting *amici* cite several cases supporting the proposition that the United States has the power to regulate foreign ships in U.S. waters, and from this they leap to the conclusion that U.S. statutes apply to foreign ships "absent some expression of congressional intent" to limit the application of the statute. Pet. Br. 26. Not only does the argument state this Court's long-established presumption exactly backwards, but it also betrays a fundamental misunderstanding of the court of appeals' holding in this case and thus of the controversy at issue. No one – certainly not respondent or the courts below – disputes the *power* of the United States to regulate foreign cruise ships when they are in U.S. waters. This case instead presents a question of statutory construction: when Congress enacted the ADA, did it intend to exercise that power over foreign ships? Accordingly, cases addressing the limits of a port state's power over foreign vessels are completely irrelevant.

A good illustration of how this entire line of cases is inapposite can be found in *Mali v. Keeper of the Common Jail*, 120 U.S. 1 (1887), better-known as *Wildenhus's Case*, in

which this Court permitted the prosecution of a homicide committed below the deck of a Belgian ship moored at a Jersey City dock. Petitioners and the government stress "the lack of any specific statement of legislative intent," Pet. Br. 29, and that "the statute made no specific reference to foreign ships," U.S. Br. 22,[20] but that is not surprising. The *Wildenhus* Court, in sharp contrast with the situation here, was not construing the underlying statute. Indeed, it would have been surprising if this Court had construed the underlying New Jersey statute – a task better left to the state courts. The issue there, which arose in the context of a habeas case, was whether New Jersey had the *power* to try the prisoner. *See Romero*, 358 U.S. at 382 & n.54 (*Wildenhus's Case* "deal[t] with the sovereign power of the United States to apply its law to situations involving one or more foreign contacts"). Because the Court concluded that New Jersey did have that power, the writ was denied, and no issue of statutory construction was ever considered.

Even if *Wildenhus's Case* had addressed an issue relevant to this case, it would be readily distinguishable on its facts. In *United States v. Flores*, 289 U.S. 137 (1933), this Court suggested that the *Wildenhus* reasoning was limited to "case[s] of major crimes, affecting the peace and tranquility of the port." *Id.* at 157-58. Moreover, the context was entirely different. The objection to the exercise of U.S. jurisdiction was made by the criminal defendant, not the shipowner. From the reported facts, it appears that the ship's officers were responsible for summoning assistance from the

[20] There does not seem to be any basis whatsoever for the government's bold assertion that the New Jersey statute did not refer to foreign ships. The statute under which Wildenhus was prosecuted is neither cited nor quoted in the Court's opinion. *Cf.* 120 U.S. at 3. But the state did quote in its brief the interstate compact giving New Jersey "exclusive jurisdiction of and over the wharves, docks and improvements made on the shore of said State, and of and over all vessels . . . fastened to any such wharf or dock." New Jersey Br. at 3. The New Jersey legislature had expressed its intent to assert jurisdiction over ships in its ports, and Congress had approved that assertion of authority.

New Jersey authorities.[21] Thus *Wildenhus's Case* may stand for little more than the proposition that a shipowner seeking the assistance of U.S. jurisdiction while in U.S. waters can obtain that assistance if U.S. authorities are willing.

II. CONGRESS EXPRESSED NO INTENT FOR TITLE III OF THE ADA TO GOVERN FOREIGN CRUISE SHIPS

A. No Evidence Exists That Congress Intended The ADA To Apply To Foreign Ships

Although Title III of the ADA contains a lengthy and exhaustive list of "public accommodations" and "specified public transportation services," it does not even mention ships, let alone foreign ships. *See* 42 U.S.C. § 12181(7), (10). Moreover, nowhere in the more than three thousand pages of legislative history on the ADA does Congress even suggest that Title III applies to foreign ships. *See* House Comm. on Educ. & Labor, 101st Cong., *Legislative History of Public Law 101-336, The Americans With Disabilities Act* (1990).

The reason for Congress's failure to apply Title III to foreign ships is not at issue in this case. Petitioners seem to think that this Court must divine the reasoning of Congress to remain silent when it could have said the Act applied. While such an exercise is unnecessary, the potential harm to international relations (a concern Congress has indicated when it enacted other U.S. laws to govern foreign ships in specified circumstances) is more than enough explanation for why Congress did not intend to regulate the construction and operation of foreign ships through Title III. The interest of Congress in not regulating foreign ships in all matters is

[21] No one witnessed the murder except crew members, *see* 120 U.S. at 3, so the police must have been summoned by someone from the ship. Certainly, if a crime were committed on a cruise ship today, the master or owner would prefer to turn the case over to local authorities as quickly as possible. Presumably, the Belgian shipowner did not want to transport a murderer back to Belgium for trial. It would be not only risky (the prisoner might kill or injure someone else, perhaps in an effort to escape), but also expensive and disruptive to normal operations.

further shown by the fact that the United States is a party to the Convention on the High Seas, in which it is stated that, "save in exceptional cases," the flag state has exclusive jurisdiction over its vessels. Art. 6, 13 U.S.T. 2312.

B. When Congress Intends To Apply A U.S. Law To Foreign Ships, It Knows How To Express Its Intent

1. Numerous statutes apply specifically to foreign ships

Since at least as early as 1889, Congress has expressed the requisite intent to apply a domestic law to a foreign vessel in the text, legislative history, or the very maritime nature of the law. In that 1889 law – entitled "Regulations as to life-saving appliances on ocean, lake, and sound steamers and foreign vessels" – Congress explicitly mandated that "foreign vessels leaving ports of the United States shall comply with the rules herein prescribed as to life-saving appliances, their equipment, and the manning of same." Act of Mar. 2, 1889, ch. 418, § 1, 25 Stat. 1012.

A further example is the Maritime Drug Law Enforcement Act ("MDLEA"), 46 U.S.C. App. §§ 1901 *et seq.*, which permits the inspection and apprehension of vessels suspected of possessing controlled substances. The statute explicitly applies to "vessels subject to the jurisdiction of the United States," which includes vessels "located within the customs waters of the United States" and vessels "registered in a foreign nation where the flag nation has consented or waived objection to the enforcement of United States law by the United States." 46 U.S.C. App. § 1903(c)(1)(C), (D).

In like fashion, the Johnson Act restricts the use of gambling devices on certain property under U.S. jurisdiction, *see* 15 U.S.C. §§ 1171 *et seq.*, and explicitly states its applicability to foreign ships, *see id.* § 1175(a) (making it unlawful to "manufacture, recondition, repair, sell, transport, possess, or use any gambling device ... on a vessel ... documented under the laws of a foreign country"). Numerous other statutes demonstrate Congress's awareness of how to include

"foreign vessels" expressly within a statute's scope when Congress has that intent.[22]

Finally, in considering the analogous circumstance of foreign air carriers, Congress gave careful consideration to the international ramifications of its actions.[23] In 1986, Congress enacted the Air Carrier Access Act ("ACAA"), but made no specific mention of, or provisions for, foreign carriers. In

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[22] *See, e.g.*, 14 U.S.C. § 89(a) (permitting Coast Guard to engage in searches on "waters over which the United States has jurisdiction" of "any vessel subject to the jurisdiction, or to the operation of any law, of the United States"); 18 U.S.C. § 7 (extending under the Violent Crimes Control Act the special maritime and territorial jurisdiction of the United States, to the extent permitted by international law, to any foreign vessel during a voyage having a scheduled departure from or arrival in the United States with respect to an offense committed by or against a U.S. national); 18 U.S.C. § 2274 (making it unlawful for "the owner, master or person in charge or command of any private vessel, foreign or domestic, or a member of the crew or other person, within the territorial waters of the United States" willfully to cause or permit the destruction or injury of such vessel in certain specified circumstances); 19 U.S.C. § 1703 (applying customs enforcement authority to foreign vessels suspected of smuggling merchandise into United States); 46 U.S.C. § 3505 (stating that "a foreign vessel may not depart from a United States port with passengers who are embarked at that port, if the Secretary finds that the vessel does not comply with" SOLAS); 46 U.S.C. § 3502(d) (requiring "foreign vessels arriving at a United States port" to maintain accurate passenger list); 46 U.S.C. § 3504(a) (requiring foreign or domestic passenger vessel accommodating more than 50 passengers to notify passengers of the safety standards applicable to the vessel); 46 U.S.C. § 6101(d)(1) (requiring "a foreign vessel when involved in a marine casualty on the navigable waters of the United States" to report to the Coast Guard); 46 U.S.C. § 9302(a)(1) (requiring U.S. and foreign vessels to engage a U.S. or Canadian registered pilot for navigating a route upon the Great Lakes); 46 U.S.C. § 10313(i) (applying the Seaman's Wage Act to "a seaman on a foreign vessel when in a harbor of the United States"); 47 U.S.C. § 321(b) (requiring foreign vessels in U.S. territorial waters to give "absolute priority" to distress signals from other ships); 47 U.S.C. § 507(a) (foreign vessels navigated in violation of the Great Lakes Agreement or associated rules shall be subject to $500 fine).

[23] Aircraft are flagged in a particular country but move from jurisdiction to jurisdiction as do ships. *See Restatement* § 501 note 10.

2000, Congress amended that Act to include foreign air carriers. In doing so, Congress specifically required those executive branch officials charged with enforcing the ACAA to "act consistently with obligations of the United States Government under an international agreement." 49 U.S.C. § 40105(b) (referenced in 49 U.S.C. § 41705(a)). Consequently, it is abundantly clear that, in amending the ACAA, Congress deliberated on the potential conflict between the statute and international law. *See Torturro v. Continental Airlines*, 128 F. Supp. 2d 170, 180 (S.D.N.Y. 2001).

Congress therefore has expressly provided when it wants a statute to govern a foreign ship. "When it desires to do so, Congress knows how to place the high seas within the jurisdictional reach of a statute." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989); *see also ARAMCO*, 499 U.S. at 258. The ADA simply does not evince that intent.

2. The same Congress that enacted the ADA extensively debated and enacted a law to apply to foreign ships

That history of congressional awareness of the need to specify application of a statute to foreign vessels gains even more currency in light of the fact that the *very same Congress* that enacted the ADA debated for weeks over whether to impose special design and construction standards on *foreign* oil tankers. The Oil Pollution Control Act of 1990 ("OPA '90"), 46 U.S.C. §§ 9101-9102, explicitly applies to foreign tankers. In the debates leading up to enactment of OPA '90, Congress gave a thorough consideration to the consequences of such regulations for international maritime activities. The Joint House and Senate Committee substituted the phrase "international standards accepted by the United States" for the original language, "customary international law," in § 9101(a)(2)(A). *See* H.R. Conf. Rep. No. 101-653, at 132 (1990). The Committee explained that this modification in the statutory language resulted from the fact that "the United States has not ratified the international

convention on manning, training, certification, and watch keeping for seafarers" and that the "standards under United States law are more stringent than those contained in the convention and those of many other nations." *Id.* As Congress did not want to burden foreign vessels with higher standards than those set out under international law, the Committee expressed its intent "that 'standards equivalent to United States law' or 'international standards accepted in the United States' may be considered to include the convention" and specified that "standards equivalent to those of the convention should be considered as the minimum standard for meeting the requirement of this Section." *Id.*

Congress did the same with other sections of the Act, such as those concerning devices for warning of overfills of cargo tanks. Congress specifically considered the effects on foreign vessels and required that regulations adopted under that section be "consistent with international law." *Id.* at 135-36.

But, as to an additional requirement, Congress decided to buck the international community. The original Senate version of Section 4115 of OPA '90 Act mandated "the completion within one year of a rule-making to require that all affected oil tankers which are newly constructed be equipped with double hulls and double bottoms." S. Rep. No. 101-99, at 14-16 (1990). That structural requirement generated a lengthy debate over Congress's power and the propriety of imposing U.S. standards on the design and construction of foreign vessels. The Senate Commerce, Science, and Transportation Committee specifically stated that "this subsection applies to all affected oil tankers, both foreign and domestic." *Id.* The Committee took that step even though it recognized that the double-hull requirement had been "specifically rejected" by the IMO and it was likely to meet with disapproval in the international community. *Id.* Nevertheless, the Committee "fully intended that the burden fall heavily on the Secretary to implement the requirements unless the evidence against such requirements is both clear and convincing" and directed that any such determination "cannot be based solely

upon foreign policy grounds or the impact of such requirements on U.S. membership in international maritime organizations." *Id.* Given the extensive debate in OPA '90 over the propriety of the U.S. imposing design, equipping, and construction standards on foreign vessels, it is telling – if not completely dispositive – that the same Congress uttered not a single word in connection with legislation that in petitioners' view would have an identical effect on foreign cruise ships.

C. The Remedial Scope Of The Act Does Not Indicate Its Application To Foreign Ships

Title III's remedial focus on protecting U.S. citizens does not of its own force support a supposition that Congress intended the ADA to apply to foreign ships. Under petitioners' theory that a ship must be structurally modified to meet ADA requirements, the protections of U.S. law go wherever an American citizen goes. Yet that has never been the law.

Both Congress and this Court have treated remedial civil rights statutes just like any other statutes by *not* extending their application extraterritorially or to foreign ships absent a clear expression of congressional intent. In 1984, for example, when Congress amended the Age Discrimination in Employment Act of 1967 ("ADEA") to cover Americans employed by U.S. corporations overseas, it explicitly noted the sovereignty and comity issues at stake and took pains to articulate how it had attempted to minimize potential international discord:

> When considering this amendment, the committee was cognizant of the well-established principle of sovereignty, that no nation has the right to impose its labor standards on another country. That is why the amendment is carefully worded to apply only to citizens of the United States who are working for United States corporations or their subsidiaries. It does not apply to foreign nationals working for such corporations in a foreign workplace and it does not apply to foreign companies which are not controlled by United States firms. Moreover, it is the intent of the committee that this amendment not be enforced where compliance with its prohibitions would place a United States company or its subsidiary in violation of the laws of the host country.

S. Rep. No. 98-467, at 27-28 (1984). Nothing similar exists in Title III's text or legislative history to demonstrate Congress's intent to apply the ADA to foreign ships. Indeed, even though the ADA clearly addresses the issue of its possible interference with those of *state* sovereigns by explicitly providing that it will not diminish or weaken similar state laws, *see* 42 U.S.C. § 12201(b), the statute and its legislative history are completely silent with respect to intrusions on the laws of *foreign* sovereigns.

The absence of evidence that Congress intended to apply Title III to foreign ships also contrasts sharply with Title I of the ADA[24] and Title VII. Those statutes – also intended to protect U.S. citizens – demonstrate convincingly that Congress knows how to clearly express its desire to apply an anti-discrimination statute in a foreign context. In *ARAMCO*, this Court found that Congress had not expressed an intent that Title VII apply extraterritorially. *See* 499 U.S. at 258. Following that decision, Congress made several amendments to both Title VII and to Title I of the ADA to indicate such an intent. First, Congress amended both statutes to include, as "employees," U.S. citizens working "in a foreign country." 42 U.S.C. §§ 2000e(f), 12111(4). Second, both statutes exempted employers if compliance would run afoul of the law in the country where a workplace was located. *See id.* §§ 2000e-1(b), 12112(c)(1). *See also* 29 U.S.C. § 623(f)(1) (granting the same exemption under the ADEA). Third, Congress specified that both statutes would not apply to foreign operations of foreign employers not controlled by a U.S. employer. *See* 42 U.S.C. §§ 2000e-1(c), 12112(c)(2)(B).

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[24] Title I of the ADA, 42 U.S.C. §§ 12111-12117, contains the provisions of the Act governing employment.

Although Congress could have amended Title III of the ADA to apply to U.S.-owned or -controlled foreign accommodations, foreign ships, or even U.S. ships in non-U.S. waters, notably, it did not. Title III and its legislative history contain no language whatsoever encompassing ships, foreign or not. Furthermore, Title III also contains no mechanism for dealing with potential conflicts of laws, unlike the amendments described above.

Petitioners also argue (at 36) that the ADA's "liberal purposes" demand a "broad construction." Whatever application this general platitude may have, it does not alter the requisite coverage inquiry to be conducted with respect to foreign ships. *Benz*, *McCulloch*, and *ARAMCO*, each of which involved legislation with similar "liberal purposes," did not enlarge the labor statutes at issue to encompass foreign entities simply to fulfill those purposes. Petitioners' argument (at 33) that to refrain from applying Title III to foreign ships would "render . . . meaningless" the Act incorrectly assumes that Congress intended to regulate the structure, design, and policies of ocean-going ships through the injunctive suits that Congress made the sole remedies in Title III. To restate the obvious, the ADA is not a maritime statute.

Petitioners' further attempt (at 32) to stretch the ADA finds no support in *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206 (1998). If anything, *Yeskey* supports NCL's arguments by demonstrating that Congress knows how to specify its intent to apply a statute to the precise entities – sovereign or otherwise – when it wants to. *Yeskey* was an ADA Title II case[25] in which this Court interpreted the term "public entity" to include state prisons. This Court assumed that Title II could be applied to state entities only if it contained Congress's "unmistakably clear" intent that the

[25] Title II of the ADA prohibits disability discrimination by "public entities." *See* 42 U.S.C. § 12131.

statute be so applied. *Id.* at 208-09.[26] Making such an assumption, the Court easily determined that the statute applied to state prisons because Title II's plain text encompassed "state" entities. The text encompassed "'any department, agency, special purpose district, *or other instrumentality of a State* or States or local government.'" *Id.* at 210 (quoting 42 U.S.C. § 12131(1)(B)) (emphasis added). By contrast, no "foreign" entities of any kind are described in Title III, let alone foreign ships.[27] Accordingly, the remedial purposes of the ADA and its importance as domestic legislation are not justifications for negating the presumption against the application of U.S. law when that law creates a danger of conflicting with the laws of foreign nations or international treaties.

D. Applying The ADA To Foreign Ships Would Create Actual And Potential Conflicts, Thereby Raising The Specter Of International Retaliation

Through structural and non-structural changes, applying the ADA to foreign ships poses actual and potential conflicts.

1. Non-structural changes

Safety is always the paramount concern of any ocean-going craft. Under SOLAS, for example, "[a]ll survival craft required to provide for abandonment by the total number of persons on board shall be capable of being launched with their full complement of persons and equipment within a period of 30 min[utes] from the time the abandon ship signal is

[26] This canon of construction rests on the principle that a statute should be interpreted to preserve, rather than undermine, the states' sovereign powers, *see* 524 U.S. at 208-09 – a principle similar to the sovereignty principles underlying the rule that a statute should not be applied to foreign-flagged ships absent Congress's specific intent. *See supra* p. 15.

[27] The federal government (at 8) also cites *Yeskey*'s reference to the "breadth" of Title II. But *Yeskey* only referenced the statute's "breadth" in rejecting the argument that Congress did not envision its application to "prisons" and "prisoners." 524 U.S. at 211-12. The Court did not hold that the statute's alleged "breadth" permitted its application to state entities. The Court had already found that the statutory text revealed Congress's "unmistakably clear" intent to apply the statute to state entities.

given." Ch. III, Reg. 21.1.4 (2001 ed.). Unlike hotels or restaurants, all ships must meet SOLAS's 30-minute evacuation requirement.

Petitioners complain about NCL's requirements that passengers identify themselves as having a disability and travel with a companion (Pet. Br. 8), but those complaints reflect a fundamental misunderstanding of NCL's paramount duty to put the safety of all its passengers as its top priority. If a fire were to break out on a ship, for example, a deaf person would be unable to hear an alarm, a blind person would be unable to evacuate quickly using the shortest route, and a mobility-challenged person would need special assistance. NCL therefore designates particular crew members to find passengers with special needs and to escort or carry them to evacuation points. A wheelchair bound passenger simply cannot block a hallway to the detriment of other passengers or navigate a stairway in the event of a power loss, so the special NCL teams facilitate their evacuation. In that manner, the safety of *all* passengers can be assured. Such safety measures directly clash with petitioners' conception of "discriminatory practices and policies" (Pet. Br. 17), but they are critical in a life-threatening situation.

2. Structural changes

Even certain of petitioners' proposed structural changes – such as having cabins available throughout the ship – pose safety concerns because of the number of staircases a person would need to traverse to reach evacuation points.[28] As for shipwide structural changes, the overwhelming majority of desired accessibility measures are being designed and built in

[28] Petitioners complain (at 19 & n.7) about NCL's "run-of-the-ship" pricing offer, but that complaint has no merit. It does not appear from the complaint that petitioners sought to participate in that offer, so they have no standing to complain that other passengers were able to benefit from it. Even if they had standing, the safety considerations on a ship would always give the shipowner and the captain the flexibility to decide where to house passengers to maximize the chances for survival for everyone onboard – passengers and crew alike.

the newest ships. That includes specially accessible restrooms throughout the ship; greater accessibility features in restaurants, casinos, and theaters; ramps and wider passageways for wheelchair accessibility; grab-bars and other devices in needed locations; special warning devices for hearing- and vision-impaired persons; and even special technical innovations in tenders that more readily enable passengers with special needs to exit the ship. As one journalist who uses a motorized scooter has written of one of NCL's newest ships, "I found all of the public rooms entirely accessible," and "the ship fully accessible." A. Vladimir, "Freestyle Cruising Is A Winner," 5 *Open World* 5, 6, 7 (Fall 2002). That does not mean, however, that retrofitting *older* cruise ships would be feasible or commercially practicable, or that the United States can act unilaterally to impose its accessibility design requirements on the rest of the world. It plainly makes no sense for a cruise line to expend tens of millions of dollars trying to implement certain accessibility measures on a ship like the old *Norwegian Star* that was designed two decades before enactment of the ADA.

That is particularly true given the economics of the cruise industry: older ships get moved to secondary and foreign markets when they can be replaced by newer ships designed with added accessibility features. Petitioners' complaints about NCL's older ships require such expensive remedial measures that Congress could not have envisioned bankrupting a cruise line to comply with ADA standards so that the main beneficiaries of those changes would be passengers in Asia and Europe, where the older ships are being sent after being replaced by modern ships designed with greater accessibility features. Yet that is the practical consequence of the universe envisioned by petitioners.

Even as to designs for newer ships, the specter of potential and actual conflicts between ADA-imposed standards and international and flag-state standards is real. For example, the Passenger Vessel Access Advisory Committee ("PVAAC"), a DOT creation, has identified some apparent

conflicts between the current Title III barrier-removal standards and SOLAS. *See Recommendations for Accessibility Guidelines for Passenger Vessels*, Ch. 13, Parts I-II (Dec. 2000), *available at* http://www.access-board.gov/pvaac/commrept/index.htm (last visited Jan. 27, 2005) (referencing potential conflicts between SOLAS and the guidelines announced by the ADA Accessibility Guidelines ("ADAAG") Review Advisory Committee, the governmental body tasked by Congress with formulating the Title III barrier-removal guidelines). Thus, there is little, if any, dispute that Title III's barrier-removal requirements potentially conflict with SOLAS, a treaty the United States vigorously enforces. *See Locke*, 529 U.S. at 102-03. Any accessibility regulations promulgated by DOJ and DOT must at least meet the minimum accessibility guidelines issued by the PVAAC. *See* 42 U.S.C. § 12186(c). Under the current law, therefore, DOJ and DOT appear not to have any coherent methodology for relaxing any guidelines that conflict with international treaties or flag-state laws.

Such conflicts are already readily apparent. In 1996, for example, the IMO promulgated accessibility guidelines for large passenger ships. *See supra* p. 22. Among them is the requirement that accessible cabins should be located on or near the embarkation deck to facilitate evacuation of passengers with disabilities in an emergency. *See* MSC Guidelines § 17. However, Title III requires equal, integrated access to all facilities. Under the shore-side regulations applicable to buildings, such access has been interpreted to mean accessible rooms within all price levels. *See* 28 C.F.R. Pt. 36, App. A, § 9.1.4(1). But, given the need to locate accessible cabins near evacuation points and to minimize the number of staircases needed to carry passengers with physical mobility challenges to safe evacuation points, compliance with IMO and SOLAS standards is quite different from petitioners' conception of ADA requirements. Even matters as seemingly simple as accessibility for restrooms present conflicts. The ADAAG and MSG Guidelines have different

requirements for the size and location of bathroom stalls, the space around the toilet, and whether grab-bars must be permanently affixed or folding. *See id.* §§ 4.1.3(11) (public restroom must contain accessible toilet facilities), 4.17.3 (toilet stall dimensions and distance of toilet from side wall), 4.17.6 (grab-bar location); MSC Guidelines § 16, App. Tab D.

The potential for conflict also exists with the laws that flag nations may apply to their own ships. Many nations are enacting regulations governing legal rights of disabled people. A recent survey reveals that 42 countries have disability human rights laws.[29] That number is likely to increase substantially in light of the United Nations' promulgation of Standard Rules for the Equalization of Opportunities of Persons With Disabilities in 1993.[30] Flag nations, such as the United Kingdom, are actively considering the promulgation of regulations specifically applicable to passenger vessels, including cruise ships that it flags.[31]

In addition to actual conflicts with the laws of flag nations, a holding that Congress *sub silentio* applied the ADA to foreign ships runs counter to the reasonable policy judgments of flag states that may prefer to allow market forces to operate on cruise lines to strike the proper balance among accessibil-

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[29] *See* Theresia Degener & Gerard Quinn, *A Survey of International, Comparative and Regional Disability Law Reform*, From Principles to Practice: An International and Disability Law and Policy Symposium (Oct. 22-26, 2000), *available at* http://www.dredf.org/international/degener_quinn.html (Oct.-Dec. 2000). See Bahamas *Amicus* Br. 26; Mediterranean Shipping Co. *Amicus* Br. 3.

[30] *See* G. A. Res. 48/96, U.N. GAOR, 48th Sess., Supp. No. 49, at 202, U.N. DOC. A/48/49 (1993).

[31] *See* Disabled Persons Transport Advisory Committee, *Annual Report 1998 – Report of the Ferries Working Group* (Oct. 1, 1999) (listing "Access to cruise ships" as a Committee priority), *available at* http://www.dptac.gov.uk/98report/5.htm#1. It would appear that compliance with certain proposed U.S. guidelines – with respect to such issues as ramping, width of accessible doors, and amount of force needed to open doors – would conflict with British standards. *See* http://www.dptac.gov.uk/pubs/guideship/pdf/dptacbroch.pdf.

ity, safety, and commercial viability. The legitimacy of this position is underscored by petitioners' own brief (at 18 & n.4), which recognizes that market dynamics in the cruise industry are already responding to the needs of passengers with disabilities. Indeed, in the U.S. market, the latest generation of cruise ships has greatly increased accessibility for the disabled. But to require a major retrofitting of old ships – ordered, designed, and built before enactment of the ADA and likely to be removed from the U.S. market within a few years – is both economically irrational and unsound public policy. This Court should not infer that Congress intended such a bizarre result without expressly indicating such an intent.[32]

The fact that almost all cruise ships are designed and constructed outside the United States creates an additional but major problem for the application of Title III. DOT's recently issued and proposed guidelines call for compliance with U.S. engineering standards. But foreign shipyards do not recognize those standards. Instead, they follow the flag state's (and their own nation's) standards, as informed by international conventions. Classification societies enforce those standards through regular and (in the case of the best societies) rigorous inspections and audits. The international community, with the U.S.'s active leadership, has developed and nurtured that system, which would be undermined if port states could impose their own engineering standards.

Finally, given the debate over the double-hulled tankers in OPA '90, it would have been entirely rational for Congress to have supposed that imposition of ADA standards would encourage international retaliation against the United States, a consequence to be avoided. At the very least, this Court should not simply guess at Congress's intent when Congress

[32] Petitioners also rely (at 18 & nn.4, 5, 9) on settlements reached in lawsuits with other cruise lines. Those settlements, however, do not go nearly as far as petitioners seek in compelling industry-wide changes in compliance with the ADA, and the cruise line defendants in those cases have also reserved certain rights if *Stevens* is overruled.

itself can deliberate over whether the benefits of such an application outweigh its costs.

E. Petitioners' Position Would Apply All U.S. Domestic Laws To Foreign Ships

Petitioners' sweeping legal argument reveals no limiting principle. Under their theory, virtually any law on which Congress has expressed no specific intent will apply to foreign ships or extraterritorially. This Court has already rejected an analogous argument to petitioners' assertion that Title III encompasses foreign ships because the statute's jurisdictional element extends to public accommodations that affect "commerce." In *ARAMCO*, the Court held that Title VII's similar jurisdictional element – present in "any number" of federal statutes, including the ADA – did not demonstrate Congress's specific intent to apply the statute on foreign soil. 499 U.S. at 249-53. The Equal Employment Opportunity Commission ("EEOC"), relying on two statutory terms, contended in *ARAMCO* that Congress intended for Title VII to apply abroad. The EEOC argued that Title VII's definitions of "employer" and "commerce" were sufficiently broad to include U.S. companies located outside the United States. *Id.* Despite conflicting plausible interpretations of the relevant language, the Court found that it "need not choose between these competing interpretations as we would be required to do in the absence of the presumption against extraterritorial application." *Id.* at 250. Moreover, under the EEOC's interpretation, "[t]he intent of Congress as to the extraterritorial application of this statute must be deduced by inference from boilerplate language which can be found in any number of Congressional acts, none of which have ever been held to apply overseas." *Id.* at 250-51 (citing the ADA, 42 U.S.C. §§ 12101 *et seq.*) (other citations omitted).

Similarly, in finding no evidence of such an intent in the phrases "in commerce" and "affecting commerce" in the NLRA, the *McCulloch* Court flatly rejected the exact argument that petitioners are making here:

> Petitioners say that the language of the Act may be read literally as including foreign-flag vessels within its coverage. But, as in *Benz*, they have been unable to point to any specific language in the Act itself or in its extensive legislative history that reflects such a congressional intent.

McCulloch, 372 U.S. at 20. As in *ARAMCO* and *McCulloch*, Title III's inclusion of this exact boilerplate jurisdictional element does not demonstrate that Congress intended to apply the statute to foreign ships.

F. *Stevens* Should Be Overruled

Only the Eleventh Circuit in *Stevens* has applied Title III to a foreign ship.[33] For several reasons, *Stevens*'s analysis is unpersuasive and should be overruled.

First, *Stevens* made wholly unwarranted and contradictory assumptions about what Congress knew when it passed Title III. After acknowledging that "Congress might not have specifically envisioned the application of Title III to ships," *Stevens* determined that some cruise ships could be covered by Title III solely because some areas on cruise ships may themselves fall within the definition of "public accommodations." 215 F.3d at 1241.[34]

The *Stevens* court then jumped to the conclusion that, because the ADA applied to cruise ships, Congress must have intended that it apply to *foreign* ships. *Id.* at 1242-43. The court justified that unfounded leap of logic by citing an

[33] A district court has also recently considered the question presented in this case and, like the Fifth Circuit below, held that Title III does not apply to foreign ships. *See Giacopini v. Crystal Cruises, Inc.*, Case No. C-04-1089MMC (N.D. Cal. June 25, 2004). After reviewing the analysis in both *Stevens* and the decision below, the *Giacopini* court found "the detailed analysis set forth in *Spector* to be persuasive and, for the reasons set forth in *Spector*," found "that Title III of the ADA has no applicability to foreign-flag cruise ships." Slip op. at 10.

[34] It was possible, the Eleventh Circuit acknowledged, that "[s]ome cruise ships may contain none of the enumerated public accommodations" – in that case, "such cruise ships would not be subject to the public accommodation provisions of Title III." 215 F.3d at 1241 n.5.

observation from DOT, made *after* the statute was passed, that most cruise ships serving the United States are foreign-flagged. *Id.* at 1243. It then concluded – after assuming that Congress was aware of the prevalence of foreign ships in the cruise industry – that it "seems strange" that Congress would not have also intended that foreign ships be covered. *Id.* But, if Congress did not necessarily envision that the statute would apply to cruise ships at all, *id.* at 1241, it is difficult to understand how it could have intended that the statute encompass foreign ships. Moreover, when one properly considers (as the Eleventh Circuit did not) the vast body of international maritime law and international comity principles that accord special significance to a ship's flag, it is not remotely "strange" at all that Congress did not intend Title III to apply to foreign ships.

III. MARITIME CHOICE-OF-LAW PRINCIPLES ARE IRRELEVANT TO THE ADA'S PROPER INTERPRETATION

Petitioners' efforts to rely on choice-of-law cases arising under the Jones Act demonstrate a fundamental misunderstanding of the issue before this Court. The question here is whether Congress intended a domestic statute to apply to foreign ships, despite the general presumption against such a broad interpretation, when Congress gave no indication of any such intent. In contrast, this Court has long recognized that the Jones Act was passed to "supplement" the general maritime law, *see Panama R.R. v. Johnson*, 264 U.S. 375, 388 (1924), which has always had the potential to govern foreign ships. The issue in Jones Act cases has never been whether the Act *could* apply on foreign ships, but rather *if* it applied to a particular claim under the circumstances.[35] "The question whether the Jones Act . . . is applicable to a foreign

[35] It is noteworthy that, even under maritime choice-of-law principles, the law of the flag is still of paramount importance. That law "must prevail unless some heavy counterweight appears." *Lauritzen*, 345 U.S. at 586. *See also Romero*, 358 U.S. at 384 (applying the law of the flag).

seaman is . . . not a statutory interpretation question but a choice of law question." 10 *Benedict on Admiralty* § 6.03 (7th rev. ed. 2004). Because the *Lauritzen* line of cases addresses an entirely different question than the one now before the Court, it is irrelevant here.[36]

In *McCulloch*, this Court explicitly rejected the use of a choice-of-law analysis in ruling that the NLRA does not apply to foreign ships. The Court explained that the NLRB's "ad hoc weighing of contacts" approach would lead to "embarrassment in foreign affairs and be entirely infeasible in actual practice." 372 U.S. at 19. It "would raise considerable disturbance not only in the field of maritime law but in our international relations as well." *Id.*

As in *McCulloch*, it would be infeasible to determine the application of Title III on a voyage-by-voyage basis, given that foreign ships span a wide spectrum – even within a single operator's fleet – from those that regularly embark passengers in the United States, to those that occasionally do, to those that seldom or never do. Even individual ships have changing itineraries that span the full spectrum. *See, e.g., Norwegian Sea* (*supra* p. 19). This infeasibility is especially significant in the context of Title III, given the permanent structural modifications that petitioners' expansive reading of the statute would require. Unlike the ease with which ships change itineraries, widespread changes to permanent structures would be much more difficult and costly.

The *ad hoc* weighing of contacts approach used in Jones Act cases to choose the governing law should not be adopted here to decide the applicability of Title III to foreign ships. Because ocean-going ships sail between jurisdictions, centu-

[36] It is inconceivable to think, as petitioners apparently do, that Congress must have intended the scope of the ADA to be determined by reference to the *Lauritzen* factors. *See* Pet. Br. 34-36. Even if *Lauritzen* and its progeny were relevant to determining the general scope of a statute, Congress had no occasion to consider this purely maritime line of cases in enacting a statute with no maritime connections whatsoever.

ries of experience have taught that it is best for one set of laws to govern their architecture and internal affairs. *See supra* pp. 19-20. International practice recognizes that international conventions and the flag state's laws should govern.

Petitioners also misapply the maritime doctrine of seaworthiness, but the doctrine applies only to seamen; it does not apply to passengers. *See, e.g., Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 626, 629 (1959).[37]

Petitioners' citation (at 35) of the choice-of-law clause in NCL's passenger ticket further reflects their confusion about the question presented here. This contractual provision does not extend the application of Title III beyond the scope that Congress intended for it, any more than it makes U.S. aviation or railroad statutes applicable to cruise lines. The clause simply specifies, for cases in which the laws of more than one nation might by their own terms apply, that U.S. law will apply to the extent that NCL is otherwise subject to it.

Petitioners argue that, wherever U.S. citizens go, they take all U.S. laws with them. That remarkable position is contrary to every expectation a passport-carrying passenger has when boarding a foreign cruise ship, knowing that the ship is about to sail to a foreign port and that the casino will open once the ship leaves U.S. territorial waters (because U.S. laws limiting gambling would then cease to apply).[38] Passengers are

[37] Even Prof. Gutoff eventually concedes this point, *see* Gutoff *Amicus* Br. 34, thus undermining his prior insistence that the doctrine is somehow relevant in a case brought by passengers. Perhaps the most relevant portion of that *amicus* brief is the implicit concession that the maritime choice-of-law principles from *Lauritzen* do not apply unless substantive maritime law applies – thus explaining the remarkable (but unsupported) assertion that petitioners could have asserted maritime tort and contract claims. *See* Gutoff *Amicus* Br. 17. If this were true, of course, there would be no point in extending the ADA to cruise ships, let alone to foreign cruise ships.

[38] *See* Johnson Act, *supra* pp. 30-31. In fact, under the U.S. cabotage laws, foreign cruise ships calling at U.S. ports are required to visit a foreign port during every cruise. *See* 46 U.S.C. App. § 289.

required to have appropriate credentials to reenter the United States after the cruise. Passengers on foreign ships are effectively stepping into a foreign country at the moment of embarkation. "American passengers simply do not carry American public policy on their backs wheresoever they may venture." *Hodes v. S.N.C. Achille Lauro*, 858 F.2d 905, 915 (CA3 1998). This Court has recognized that basic fact: "[W]e cannot have trade and commerce in world markets in international waters exclusively on our terms, governed by our laws, and resolved in our courts." *Bremen v. Zapata Offshore Co.*, 407 U.S. 1, 9 (1972). That rule applies most forcefully to foreign ships.

IV. THE INFORMAL DOJ AND DOT INTERPRETATIONS OF TITLE III CANNOT EXTEND THE JURISDICTION OF THE ADA AND ARE NOT ENTITLED TO *CHEVRON* DEFERENCE

This Court has not hesitated to reject agencies' opinions when the Court's task is simply to examine the statutory text and history to determine coverage. *See, e.g., McCulloch*, 372 U.S. at 19 (rejecting the balancing approach adopted by the NLRB to determine whether to apply the NLRA to foreign ships and instead looking directly to evidence of Congress's intent); *ARAMCO*, 499 U.S. at 1235 (rejecting the EEOC's opinion that Title VII applied extraterritorially); *see also Boureslan v. ARAMCO*, 857 F.2d 1014, 1019 n.2 (CA5 1988) (giving "less deference than usual" to the EEOC's interpretation of the scope of Title VII because the question was a "jurisdictional issue with little or no statutory language or legislative history"), *aff'd*, 892 F.2d 1271 (CA5 1990) (en banc), *aff'd*, 499 U.S. 244 (1991).

DOJ and DOT have never promulgated regulations under Title III to govern cruise ships. Indeed, neither agency has issued any regulation under Title III that even mentions ships. The technical assistance manuals and other agency comments that petitioners cite (at 12-13 n.2, 25) are not interpretations derived from formal adjudication or rulemaking procedures and thus are not entitled to *Chevron*

deference. *See United States v. Mead Corp.*, 533 U.S. 218, 229-31 (2001); *Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

As this Court held in *Edelman v. Lynchburg College*, 535 U.S. 106 (2002), "[i]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with [our] precedents . . . and that it expects its enactments to be interpreted in conformity with them." *Id.* at 117 n.13 (citing *North Star Steel Co. v. Thomas*, 515 U.S. 29, 34 (1995)). When Congress enacted the ADA, therefore, it knew from this Court's precedents that Title III would not be applied to foreign ships because there was no clear indication of such coverage. Ignoring that language in *Edelman*, petitioners mistakenly argue that Congress acquiesced to DOT's and DOJ's interpretation of Title III. This argument fails for several obvious reasons. First, petitioners' reliance on *Edelman* is misplaced. *Edelman* involved a dispute over procedure for the EEOC's handling of EEOC charges – a matter within the agency's obvious purview. *See* 535 U.S. at 109 (authority to adopt "suitable procedural regulations" not exceeded). The present case involves the threshold and indisputably substantive issue of whether Title III applies at all. DOJ is entrusted to promulgate regulations implementing the "public accommodations" provisions of Title III, *see* 42 U.S.C. § 12186(b), but it has no institutional maritime expertise, so nothing in that provision would suggest that Congress was empowering DOJ to decide that Title III applies to foreign cruise ships. And the provision conferring authority on DOT to issue regulations for "specific public transportation services," *id.* § 12186(a)(1), clearly encompasses buses, vehicles, and trains, but says nothing about ships, *id.* § 12186(a)(2), (d).

Second, the *Edelman* Court explained that Congress had noted and included the regulation at issue in the *Congressional Record* when amending Title VII, thereby indicating Congress's clear knowledge of that administrative interpretation. *See* 535 U.S. at 117-18. Here, no regulatory statements were ever noted or included in any record of any debate or

proceeding. Finally, courts had upheld the EEOC's regulation, whereas here only the *Stevens* court has been persuaded that Title III applies to foreign ships.

* * * * *

If this Court affirms the Fifth Circuit's judgment, and Congress later chooses to make special provisions for the disabled on cruise ships, it can do so after a full debate about the implications of encroaching on foreign ships and international agreements and with the complexity of such applications in mind. If the Court reverses the judgment below and adopts petitioners' multi-factor balancing test in the face of Congress's silence, however, its holding would necessarily have implications for many statutes that apply generally but express no intent to be applied extraterritorially or to foreign ships. It also would force Congress to consider the potential extraterritorial effects of all its legislation, a needlessly burdensome requirement. Because Congress is in the best position to enact its intent, this Court should apply the canons of construction that cause no intrusion on matters of great international importance.

CONCLUSION

The court of appeals' judgment should be affirmed.

Respectfully submitted,

DAVID C. FREDERICK
KELLOGG, HUBER, HANSEN, TODD, EVANS & FIGEL, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 326-7900

THOMAS H. WILSON
Counsel of Record
MICHAEL J. MUSKAT
SHIN-YUEH A. LEE
VINSON & ELKINS, L.L.P.
1001 Fannin Street
Houston, Texas 77002
(713) 758-2222

MARK E. WARREN
General Counsel
NCL CORPORATION, LTD.
7665 Corporate Center Drive
Miami, Florida 33126
(305) 436-4095

MICHAEL F. STURLEY
727 E. Dean Keeton Street
Austin, Texas 78705
(512) 232-1350

Counsel for Respondent

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